THOMAS E. DRAYTON, SR.
v.
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

DOCKET NO.
AT07528110105

OPINION AND ORDER

Appellant was removed from his position of Administrative Clerk, GS–6, on a charge of "fraud against the U.S. Government through the unauthorized use of a U.S. Government National Credit Card ...." The Board's presiding official held that the agency had sustained the charge by a preponderance of the evidence, and, finding no merit to appellant's claims of discrimination and reprisal, upheld the removal action. For the following reasons, appellant's petition for review is GRANTED, and the initial decision of the Board's presiding official is MODIFIED as set forth below.

The charge of fraud in this case refers to two occasions on which appellant used a government credit card to pay for gasoline that was put into his personal vehicle. On October 26, 1978, appellant charged $9.72, and on January 16, 1979, appellant charged $10.69 in gas and car washes to his personal vehicle. Appellant does not deny this conduct, but does offer an explanation for his actions.

Appellant contends that on October 26, 1978, he used a government vehicle and, while in the field, discovered that the car was low on fuel. He filled the vehicle, and, was then told that he could not charge the amount, $9.72, to the government credit card. By affidavit the service station owner testified that he does not accept credit cards. Therefore appellant paid the $9.72 out of his own cash and, as a method of reimbursement, later that day put an amount equal to $9.72, consisting of payment for both gas and a car wash for his own vehicle, on the government credit card at a gas station that would accept the credit card. With respect to the January 16, 1979, incident appellant contends that all circumstances were the same, except that on this occasion the credit card was missing from its case in the government vehicle. Again appellant's contention was corroborated by the affidavit of the second service station owner.

On both occasions, either the gas station attendant at appellant's behest or appellant himself, scratched out the license plate number of his personal vehicle that had been entered on the credit card receipt and wrote in a government vehicle's license number. Appellant contends that this was a necessary step to ensure that the gasoline station would receive payment for the charged services.

Appellant has offered two explanations for his use of this procedure to reimburse himself. The first is that when he inquired of officials at the agency's finance branch in Washington as to the method by which he could be reimbursed for gasoline expenditures, he was told that he could not use the agency's imprest fund, of which he was the cashier. Therefore, he had no alternative but to buy gasoline for reimbursement with a government credit card.

Appellant's second explanation is that a memorandum addressed to him, dated October 16, 1977, by Alfonso McGhee, a Supervisory Attorney with the agency, authorized the procedure appellant used to reimburse himself. The Board finds that neither of these explanations is adequate.

In the first place, as the presiding official found, there was a method whereby appellant could have been reimbursed in cash by the agency's motor pool. (Initial Decision at 8). Although appellant was unaware of this procedure when he chose to use the credit card for the purchase of gas for his personal vehicle, there is no reason to believe that he could not have learned about it through inquiry.

In addition, the memorandum appellant has introduced did not authorize the procedure he followed. By its terms, the memorandum authorized him to use his personal vehicle on government business, and to use the credit card for gas purchases. However, in the two instances where he used the credit card, he was not using his car for official business.

The Board has held that the element of knowledge necessary to sustain a charge of fraud "is established when the person is question ought to know, has a duty to know, or has the means of knowing the truth." *Barrett v. Air Force*, 5 MSPB 121 (1981). On these facts, appellant knew that he was using an unorthodox and unofficial method to reimburse himself, and found it necessary to falsify credit card receipts to effect this method. The Board therefore finds the charge sustained.[1]

However, the Board finds the penalty of removal to be unreasonably harsh. Among the factors that may be considered in determining whether a penalty is reasonable, the Board may consider the seriousness of the offense, the employee's past disciplinary record and the potential for the employee's rehabilitation. *Douglas v. Veterans Administration*, 5 MSPB 313 (1981).

The seriousness of the offense of fraud against the Government is mitigated by the surrounding circumstances. Appellant did not profit from his conduct, but instead, was merely trying to get repaid for expenditures he had made on behalf of the agency. However, the offense entailed a serious lack of judgment on his part.

[1]The appellant has also reasserted a claim of racial discrimination in his petition for review. He has offered, however, no new evidence or argumentation supporting the claim. We can discern no reason to disturb the presiding official's findings of no discrimination. *See* Initial Decision at 13.

Appellant has over twenty-five years of government service. The record reveals that his service is untarnished by past disciplinary actions, and his performance has been of an acceptable quality. There is no evidence that he has been an untrustworthy employee. There is no reason to believe that a lesser penalty would not fully convince appellant that he should never again seek to reimburse himself through the unacceptable procedures he devised in this case. The Board finds, therefore, that a thirty-day suspension is the maximum reasonable penalty for appellant's misconduct.[2]

Accordingly, the initial decision dated March 19, 1981, is hereby AFFIRMED as MODIFIED above, and the agency is ORDERED to cancel appellant's removal and substitute a thirty-day suspension without pay. Proof of compliance with this order shall be submitted by the agency to the Office of the Secretary of the Board within twenty (20) days of the date of issuance of this opinion. Any petition for enforcement of this order shall be made to the Atlanta Regional Office in accordance with 5 C.F.R. § 1201.181(a).

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

Appellant is hereby notified of the right to petition the Equal Employment Opportunity Commission to consider the Board's decision on the issue of discrimination. A petition must be filed with the Commission no later than thirty (30) days after appellant's receipt of this order.

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. § 7703. Appellants who file a civil action in a U.S. District Court concerning the Board's decision on the issue of discrimination have the right to request the court to appoint a lawyer to represent them, and to request that prepayment of fees, costs, or security be waived. A civil action to petition for judicial review must be filed in an appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ROBERT E. TAYLOR,
Secretary.

WASHINGTON, D.C., *April 6, 1982*

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[2]Appellant also alleged error in that the initial decision was issued three weeks after the 120-day deadline set by the Board for such issuances, 5 C.F.R. § 1201.156(a), and also more than 25 days after the closing of the record, another deadline for the issuance of initial decisions. 5 C.F.R. § 1201.111(a). However, because appellant has shown no prejudice occurring to his substantive rights as a result of these errors, we will not set aside the initial decision on these grounds. *Karapinka v. Department of Energy*, 6 MSPB 114 (1981).